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In the Supreme Court of the United States

OCTOBER TERM, 1978

WILLIAM PERNAR MITCHELL AND
HWA SIM MITCHELL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 40-89) is reported at 577 F.2d 1356.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 1978. A petition for rehearing was denied on July 12, 1978. The petition for a writ of

certiorari was filed on September 20, 1978, and is therefore substantially out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the marital privilege bars the introduction of a wife's out-of-court statements made during the course and in furtherance of a conspiracy with her husband and others.

2. Whether petitioners were denied the effective assistance of counsel at trial.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Washington, petitioners, husband and wife, were convicted with others of conspiring to transport two adult women in interstate commerce for purposes of prostitution, in violation of 18 U.S.C. 371 and 2421.[1] Petitioners were sentenced to two years' imprisonment, with all but six months of that term suspended in favor of probation (R. 172, 173). The court of appeals affirmed (Pet. App. 40-89).

The evidence adduced at trial showed that in July 1976 co-defendant Arnold Price asked Shelly Lehman

[1] Arnold Price and Charles Mitchell were tried jointly with petitioners. Price was convicted on the conspiracy count; Charles Mitchell was convicted on both the conspiracy count and one substantive count of transporting a woman in interstate commerce for purposes of prostitution.

if she would be interested in working as a prostitute in Alaska (Tr. 72-75, 751-752). Lehman, who was a police informant at the time, feigned interest in the proposal and immediately alerted local law enforcement authorities (Tr. 77-78, 276-277). Deborah Elms, a friend of Lehman and also a police informant, told Price she too would be interested in working as a prostitute in Alaska (Tr. 76, 505, 727). Price arranged a meeting in August 1976 between the two women and co-defendant Charles Mitchell, the brother of petitioner William Mitchell (Tr. 78-81). At that meeting, Mitchell and Price explained that the prostitution operation in Alaska was run by "Bill and his Korean wife," and indicated that transportation to Alaska would be arranged for them (Tr. 84-86, 104-105).

At ensuing meetings and in a number of telephone calls between the informants and co-defendant Charles Mitchell, travel arrangements and other details were settled. These conversations were recorded by FBI agents with the women's consent, and the recordings were played at trial (Tr. 106-117, 125-166a, 458-495). On August 13, 1976, Charles Mitchell transported both Lehman and Elms from Vancouver, Washington, to the airport at Portland, Oregon. Accompanied by Mitchell and with funds provided by him, the women purchased tickets and boarded a flight for Anchorage, Alaska (Tr. 174-181).

Upon their arrival in Anchorage, Elms called a telephone number provided by Charles Mitchell and

spoke with petitioner Hwa Sim ("Bobbi") Mitchell, petitioner William Mitchell's wife, who agreed to visit the women in their hotel room (Tr. 180-182, 448-449). Bobbi Mitchell came to the hotel and gave a detailed account of the prostitution operation that she and her husband ran at a massage parlor. She instructed the two women to report for work there the following day (Tr. 338-436). With the informants' consent, that conversation was recorded by the FBI and admitted into evidence (Tr. 331, 337). The two women did not report for work the next day, but instead returned to Vancouver, pursuant to FBI instructions (Tr. 186).

The evidence further showed that William Mitchell had purchased the massage parlor in Anchorage for $17,000 (Tr. 676-683). Bank records reflected that salary checks for the parlor's female employees were drawn on petitioners' joint account and signed by petitioner William Mitchell (Tr. 691-692).

Until shortly before trial, petitioners and co-defendant Charles Mitchell were represented by the same retained attorney. At that point, in view of a possible conflict of interest between Charles Mitchell and petitioners, the attorney determined that he should no longer represent Charles Mitchell (Pet. 31-32). With the assistance of an associate, petitioners' attorney therefore represented the two of them jointly at trial and on appeal.

ARGUMENT

1. Relying primarily upon *Hawkins* v. *United States*, 358 U.S. 74 (1958), petitioner William Mitchell contends (Pet. 13) that the introduction of the tape-recorded conversations between his wife and the two government informants violated the marital privilege against adverse spousal testimony.[2] This claim is without merit.

Hawkins states the general rule that a defendant in a criminal action has a privilege to prevent his spouse from testifying against him. It has generally been held that this privilege is limited to in-court testimony and does not apply to out-of-court statements by a spouse that are introduced through another witness. See *United States* v. *Mendoza*, 574 F.2d 1373, 1379 (5th Cir. 1978); *United States* v. *Cleveland*, 477 F.2d 310, 313 (7th Cir. 1973); *United States v. Doughty*, 460 F.2d 1360, 1364 n.3 (7th Cir. 1972); *United States* v. *Mackiewicz*, 401 F.2d 219, 225 (2d Cir.), cert. denied, 393 U.S. 923 (1968); *Fowler* v. *United States*, 352 F.2d 100, 113 (8th Cir. 1965), cert. denied, 383 U.S. 907 (1966); *United States v. Winfree*, 170 F. Supp. 659 (E.D. Pa. 1959); contra, *Peek* v. *United States*, 321 F.2d

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[2] The other branch of the marital privilege—the privilege against disclosure of confidential spousal communications—is not invoked here.

934 (9th Cir. 1963), cert. denied, 376 U.S. 954 (1964).[3]

The court of appeals noted that the Ninth Circuit follows the minority rule that the privilege extends to out-of-court statements testified to by third persons. The court declined, however, to apply that rule to extrajudicial statements by one spouse made in furtherance of a conspiracy to which both are parties (Pet. App. 60-63). While we believe that the majority rule is correct, the difference between the majority approach and the approach employed by the Ninth Circuit would not affect the outcome of this case. Moreover, a co-conspirator's declaration is one of the most common types of out-of-court statement by one spouse that is offered against the other. Because, as held in this case, such statements are admissible even under the Ninth Circuit rule, the theoretical conflict between the Ninth Circuit and the other courts of appeals may not be of much practical significance.[4] In any event, because the

[3] Rule 505 of the proposed Federal Rules of Evidence would have adopted the majority rule, limiting the scope of the privilege to the right to bar in-court testimony by a spouse. Although Congress did not enact proposed Rule 505, or any of the other proposed rules relating to privileges, the proposed rules are entitled to substantial weight as guides to the proper development of rules of privilege to be applied in the federal courts. See *United States* v. *Mackey*, 405 F. Supp. 854, 858 (E.D. N.Y. 1975) (Weinstein, J.).

[4] Several courts have gone a step farther and have held that the marital privilege is not available with respect to either in-court testimony or out-of-court statements if the husband and wife are shown to have been co-partners in the criminal

result reached on the marital privilege claim raised in this case would have been the same in any circuit, there is no need for review by this Court.

2. Petitioners also argue (Pet. 22-39) that they were denied the effective assistance of counsel at trial. This claim was not raised in the court of appeals until the petition for rehearing, and the court of appeals therefore did not discuss the claim in its detailed opinion in this case. Because the claim of ineffective assistance of counsel is heavily factual, and because it is being raised, in effect, for the first time in this Court, the claim is not well suited for present review. In any event, on the basis of our independent examination of the record, we do not believe that the claim has merit.

Petitioners' first contention is that their attorneys made only one pretrial motion, and that they failed to move for a change of venue or to interview the witnesses (Pet. 26). Petitioners have not suggested why a motion for a change of venue would have been appropriate or what prejudice they suffered because of their attorneys' alleged failure to interview the witnesses.[5] Moreover, their attorneys asserted the

venture. See *United States* v. *Trammel*, No. 76-1834 (10th Cir. Oct. 11, 1978); *United States* v. *Van Drunen*, 501 F.2d 1393, 1396-1397 (7th Cir.), cert. denied, 419 U.S. 1091 (1974).

[5] The thorough and effective cross-examination of witnesses conducted on their behalf (see, *e.g.*, Tr. 237-259, 531-552) belies the contention that their attorneys' pretrial preparation with respect to prospective testimony was inadequate. With respect to the claim that counsel improperly failed to seek a change of venue, it is apparent that venue was proper

marital privilege on behalf of petitioner William Mitchell, argued the motion orally and in a written memorandum of law, and succeeded in persuading the district court to make a tentative ruling in their favor. The fact that the court ultimately decided to admit Bobbi Mitchell's statements against her husband is more attributable to the weakness of the marital privilege claim in this context than to any infirmity in counsel's presentation of the issue.

Petitioner William Mitchell argues (Pet. 27-31) that he was denied the effective assistance of counsel by his attorneys' failure to seek a severance of his trial from that of his co-conspirators. But he apparently concedes that the initial joinder of the defendants was proper and that a severance was not required as a matter of law (Pet. 31). His contention is simply that the evidence against him was so slight in contrast to that against his co-defendants that a severance should have been granted had it been requested.[6]

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in the Western District of Washington, since prosecution is appropriate in any district in which an alleged offense was begun, continued, or completed. 18 U.S.C. 3237(a). There is no suggestion that a change of venue would have been appropriate under Fed. R. Crim. P. 21(a) because of pretrial publicity or any other impediment to their obtaining a fair trial in the district in which they were prosecuted.

[6] To the extent that petitioner means to suggest that the tape-recorded conversations between his wife and the two informants would have been inadmissible against him in a separate trial (Pet. 27), he is incorrect. The statements were admitted as the declarations of a co-conspirator in furtherance of the conspiracy, and as such they would be admissible against him as vicarious admissions in either a joint or a separate trial.

The claim of "disproportionate evidence" as a basis for a severance in multi-defendant prosecutions is successful only in extraordinary cases. This is not one of them. Contrary to petitioner's assertion (Pet. 27), the evidence against his co-conspirators was not grossly disproportionate to that presented against him. There was substantial evidence that a conspiracy existed to transport women to Alaska for purposes of prostitution and that Mitchell was part of that conspiracy. Even disregarding the tape-recorded conversations of his wife that directly establish his central role in the illicit operation, it was clearly demonstrated that Mitchell's Anchorage business enterprise was the ultimate destination of the female government informants recruited as prostitutes. Co-defendants Charles Mitchell and Arnold Price provided the prospective employees with money for travel and with specific instructions to contact Bobbi Mitchell, William Mitchell's wife and business partner.

This case is readily distinguishable from *United States* v. *Mardian*, 546 F.2d 973 (D.C. Cir. 1976), upon which petitioner relies (Pet. 28). Among the considerations the court recited for holding that a severance should have been granted in that case was that the marginal case against defendant Mardian was bolstered by "spill-over" from the proof against much more culpable defendants. Not only was the evidence against petitioner William Mitchell substantial, but the nature of the proof was such that the jury could readily compartmentalize the evidence

respecting the different defendants, and it was specifically cautioned to do so in the final charge of the district court (Tr. 825-826). See *Gordon* v. *United States*, 438 F.2d 858, 878 (5th Cir.), cert. denied, 404 U.S. 828 (1971).

In sum, the record discloses no basis for trial counsel to have concluded that a motion to sever would have met with success. The failure to make futile motions does not amount to ineffective assistance of counsel. See, *e.g.*, *United States* v. *Yanishefsky*, 500 F.2d 1327 (2d Cir. 1974); *United States* v. *Martin*, 489 F.2d 674 (9th Cir. 1973), cert. denied, 417 U.S. 948 (1974); *United States* v. *Smith*, 551 F.2d 348, 353-354 & n.7 (D.C. Cir. 1976); *Cheeley* v. *United States*, 535 F.2d 934, 936 (5th Cir. 1976).

Finally, petitioners claim (Pet. 31-39) that they were denied the effective assistance of counsel because of their retained counsel's failure "to explore the potential conflicts of multiple representation and to recommend separate attorneys." Petitioners correctly note (Pet. 33-35) that the courts of appeals apply different verbal formulations of the standard for determining whether defendants have been prejudiced by an apparent conflict of interest in their joint representation by a single attorney.[7] We submit that these differences need not be resolved in a case

[7] The standards adopted by the circuits that have analyzed the issue are set forth in our brief in opposition in *Hurst* v. *United States*, No. 77-5157, cert. denied, 435 U.S. 972 (1978), at 5-6, a copy of which we are providing to petitioners.

such as this, where petitioners have not shown prejudice under any test.

The fact that petitioners were represented by the same trial attorney does not in itself constitute a constitutional deprivation of counsel. *Holloway* v. *Arkansas*, 435 U.S. 475, 482 (1978). In cases in which joint representation is alleged as error on appeal, the court must ascertain whether a conflict of interest or prejudice in fact appears, and while "[o]rdinarily, prejudice would be assumed from the existence of a conflict, * * * a conflict will not be inferred from the fact of joint representation." *United States* v. *Foster*, 469 F.2d 1, 4 (1st Cir. 1972). In the instant case, petitioners have demonstrated nothing more than the fact of joint representation.

Petitioners note (Pet. 31-32) that prior to trial their attorney also represented co-defendant Charles Mitchell, but that the attorney and the trial court determined that in order to avoid the risk of a possible conflict of interest, Charles Mitchell should be separately represented. Although the record does not reflect whether petitioners were informed of the possibilities of a conflict of interest between themselves, the decision reached with respect to Charles Mitchell suggests that both the court and counsel were sensitive to the potential for conflict of interest in joint representation. The decision reached with respect to Charles Mitchell provides a reasonable basis for concluding that petitioners were aware of

the problem of potential conflict when they opted for continued representation by retained counsel.[8]

Petitioner William Mitchell suggests (Pet. 33-34) that the trial court should have inquired into the decision not to have him testify on his own behalf. Such an inquiry into defense strategy, however, would clearly be improper. Even now, Mitchell fails to suggest any way that he would have helped his cause by testifying. Counsel for petitioners was not confronted with the dilemma of representing one defendant who seeks to place blame on the other, and there is no evidence that the decision to have neither petitioner testify was prompted by concern about the possibility of conflicting defenses. The defense strategy throughout was consistent: in light of the evidence against petitioners and the other defendants, the only prospect for a favorable verdict lay in an attack upon the government's informant-witnesses and upon the conduct of the investigation of the case. Consistent with that approach, counsel urged the jury to acquit all the defendants on the basis of what he characterized as unjustifiably aggressive and technically sophisticated efforts at suppressing "victimless crimes" (Tr. 887-890).

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[8] The fact that counsel was retained rather than appointed further supports the conclusion that petitioners' decision to proceed with joint representation was knowing and intelligent. *Larry Buffalo Chief* v. *South Dakota*, 425 F.2d 271, 279 (8th Cir. 1970); *United States* v. *Gaines*, 529 F.2d 1038, 1043 (7th Cir. 1976).

In light of the strength of the government's case against both petitioners, it is unlikely that any independent defense strategy, on behalf of one or the other, would have had any greater prospect of success. Accordingly, since the record reflects no way in which either petitioner was prejudiced by the joint defense and joint representation, review by this Court is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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